Zaheed bin Ahmad & Ors v Tham Poh Theng & Ors

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO A-02–716 OF 2004
ZULKEFLI, RAUS SHARIF AND HELILIAH JJCA
25 MAY 2007

Civil Prosecure — Appeal — Credibility of witnesses — Interference by appellate court — Findings of fact — Principles applied

Civil Prosedure — Appeal — Fact, finding of — Interference by appellate court — Judicial appreciation of evidence — Contemporary documentary evidence and probabilities

Contract — Formation — Concluded contract — Sale and purchase of property — Whether there was a concluded and binding contract between vendor and purchaser

The first defendant was the beneficial owner of a shop house. The second defendant was the registered owner. The plaintiff wanted to purchase the shop house. A draft sale and purchase agreement was prepared by the plaintiff's solicitors and forwarded to the first defendant's solicitors. The first defendant's solicitors replied later that the sale price was RM180,000 and requested the plaintiff's solicitors to amend the agreement. This was done and three copies of the agreement were forwarded to the first defendant's solicitors. The first defendant's solicitors then responded that the first defendant had obtained consent of the second defendant for the transfer of the shop house to the first defendant and that the first defendant would only sign the agreement if the plaintiff agreed to pay the 10% deposit and the service fees for the transfer. The plaintiff's solicitors responded immediately and forwarded to the first defendant's solicitors the sum as deposit and service fees. However the next day they received a letter from the first defendant's solicitors informing them that the first defendant no longer intended to proceed with the sale on the grounds that the offer to purchase was withdrawn because the plaintiff failed to pay the 10% deposit. The first defendant then entered into an agreement to sell to the third, forth and fifth defendants. The plaintiff filed this action claiming inter alia a declaration that a contract existed between herself and the first defendant over the shop house, specific performance of the contract and vacant possession. After trial, the High Court found that there was an enforceable contract entered into between the first defendant and the plaintiff and granted the orders sought by the plaintiff. The defendants appealed to the Court of Appeal.

Held, dismissing the appellant's appeal:

(1) The learned High Court judge did consider all the evidence in its entirety but

found the evidence of the first defendant to be lacking in credibility. The findings of the learned judge were findings of facts. There is no dearth of authority dealing with the approach the appellate court should take when reviewing the findings of facts by the trial court. The settled principle of law is that it is undesirable that the factual findings of the trial court be disturbed by the appellate court unless it appears that those findings are clearly wrong. And it is even more undesirable to do so where the conclusion reached, to a large extent, depended on the credibility of the witnesses and the impression formed by the trial judge which has seen them and judged their honesty and accuracy (see paras 15–16).

(2) The conclusion reached by the learned judge was based on the credibility of the witnesses and the impression that he formed. He found it as a fact that the plaintiff's acceptance of the offer was received by the first defendant's solicitors on 22 October 1999 and not on 23 October 1999 as claimed by the first defendant. The learned judge disbelieved the first defendant's story as he found the evidence of the first defendant to be lacking in credibility. He gave his reasons for holding as such. Looking at his reasons, we do not see it in any way tainted with lack of judicial appreciation of the evidence placed before him. Nor did he commit any fundamental misdirection or plainly wrong in his conclusion or inference to justify this court's intervention (see para 17).

(3) The learned judge found that since the plaintiff had a prior right to the said shop house, the third, forth and fifth defendants' claim that they had an enforceable contract with the first defendant cannot succeed. The third, forth and fifth defendants were not innocent bona fide purchasers as they claimed. The facts as found by the judge clearly demonstrate that they knew about the transaction between the plaintiff and the first defendant. Even in law, they cannot claim that they have no knowledge of the said transaction. This is because the first defendant's solicitors were also their solicitors. Their solicitors knew of the existence of the transaction between the plaintiff and the first defendant. It is an established principle that the knowledge of a solicitor is the knowledge of the client (see paras 18–19).

[Bahasa Malaysia summary

Defendan pertama adalah pemilik benefisial untuk sebuah rumah kedai. Defendan kedua adalah pemilik berdaftar. Plaintif ingin membeli rumah kedai tersebut. Deraf perjanjian jual beli telah disediakan oleh peguam plaintif dan dimajukan kepada peguam defendan pertama. Peguam defendan pertama kemudiannya membalas bahawa harga jualan adalah RM180,000 dan meminta peguam plaintif untuk meminda perjanjian tersebut. Ini telah dilakukan dan tiga salinan perjanjian tersebut telah dihantar kepada peguam defendan pertama. Peguam defendan pertama kemudiannya memaklumkan bahawa defendan pertama telah mendapatkan kebenaran defendan kedua untuk pindahmilik rumah kedai kepada defendan pertama dan defendan pertama hanya akan menandatangani perjanjian jika plaintif bersetuju membayar pendahuluan 10% dan yuran perkhidmatan untuk pindahmilik. Peguam plaintif menjawab dengan segera dan memajukan kepada peguam defendan pertama jumlah sebagai pendahuluan dan

yuran perkhidmatan. Walaubagaimanapun, pada hari berikutnya mereka menerima sepucuk surat daripada peguam defendan pertama memaklumkan mereka bahawa defendan pertama tidak lagi berminat untuk meneruskan dengan penjualan atas alasan bahawa tawaran untuk membeli telah ditaribalik kerana plaintif gagal membayar pendahuluan 10%. Defendan pertama kemudiannya memasuki perjanjian untuk menjual kepada defendan-defendan ketiga, keempat dan kelima. Plaintif telah memfailkan tindakan ini menuntut antara lain perisytiharan bahawa kewujudan kontrak antara dirinya dan defendan pertama ke atas rumah kedai, perlaksanaan spesifik ke atas kontrak dan milikan kosong. Selepas perbicaraan, Mahkamah Tinggi mendapati bahawa terdapat kontrak boleh kuatkuasa yang telah dimasuki antara defendan pertama dan plaintif dan memberikan perintah yang dipohon oleh plaintif. Defendan-defendan merayu kepada Mahkamah Rayuan.

Diputuskan, menolak rayuan perayu:

(1) Hakim Mahkamah Tinggi yang bijaksana telah menimbangkan kesemua keterangan secara keseluruhannya tetapi mendapati keterangan defendan pertama kekurangan kebolehpercayaan. Penemuan oleh hakim yang bijaksana adalah penemuan fakta-fakta. Tiada kekurangan kuasa dalam menguruskan pendekatan mahkamah rayuan yang perlu diambil ketika menyemak penemuan fakta-fakta oleh mahkamah bicara. Prinsip-prinsip perundangan yang telah ditetapkan adalah tidak menginginkan penemuan fakta-fakta oleh mahkamah bicara diganggu oleh mahkamah rayuan melainkan penemuan-penemuan yang muncul itu secara jelasnya adalah salah. Dan ia adalah lebih tidak diingini untuk dilakukan apabila sesudah membuat kesimpulan, sebahagian besarnya, bergantung kepada kebolehpercayaan saksi-saksi dan tanggapan yang terbentuk oleh hakim bicara yang telah melihat dan menghakimi kejujurannya dan ketepatannya (lihat perenggan 15–16).

(2) Kesimpulan yang dicapai oleh hakim yang bijaksana adalah berasaskan kepada kebolehpercayaan saksi-saksi dan andaian yang telah dibuat. Beliau mendapatinya sebagai fakta bahawa penerimaan plaintif kepada tawaran telah diterima oleh peguam defendan pertama pada 22 Oktober 1999 dan bukan pada 23 Oktober 1999 sebagaimana didakwa oleh defendan pertama. Hakim yang bijaksana tidak mempercayai cerita defendan pertama kerana mendapati keterangan defendan pertama kekurangan kebolehpercayaan. Beliau telah memberikan sebab-sebabnya untuk terus berpegang kepadanya. Melihat kepada sebab-sebabnya, kami tidak melihat walau apa cara sekalipun sebarang kecacatan iaitu kekurangan penghargaan kehakiman kepada bukti yang telah diletakkan dihadapannya. Tidak juga beliau melakukan sebarang penyalaharahan asas atau dengan jelasnya telah khilaf dalam kesimpulannya atau inferens bagi membenarkan campur tangan mahkamah (lihat perenggan 17).

(3) Hakim yang bijaksana mendapati bahawa memandangkan plaintif mempunyai hak sebelumnya kepada rumah kedai tersebut, defendan ketiga, keempat dan kelima menyatakan bahawa mereka mempunyai kontrak boleh dikuatkuasa dengan defendan pertama tidak akan berjaya. Defendan Ketiga, keempat dan kelima adalah bukan pembeli bona fide yang tidak bersalah sebagaimana yang

didakwa. Fakta-fakta yang ditemui oleh hakim secara jelasnya menunjukkan bahawa mereka mengetahui mengenai transaksi antara plaintif dan defendan pertama. Sungguhpun dari segi perundangan, mereka tidak boleh mendakwa bahawa mereka tiada pengetahuan berkenaan transaksi tersebut. Ini kerana peguam defendan pertama juga merupakan peguam mereka. Peguam mereka tahu akan kewujudan transaksi antara plaintif dan defendan pertama. Ini merupakan prinsip yang telah dikenal pasti bahawa pengetahuan peguam adalah pengetahuan anak guam (lihat perenggan 18–19).]

Notes

For cases on credibility of witnesses, see 2(1) *Mallal's Digest* (4th Ed, 2007 Reissue) paras 826–836.

For cases on finding of fact, see 2(1) *Mallal's Digest* (4th Ed, 2007 Reissue) paras 898–1004.

For cases on concluded contract, see 3(2) *Mallal's Digest* (4th Ed, 2006 Reissue) paras 3647–3661.

Cases referred to

China Airlines Ltd v Maltran Air Corp Sdn Bhd (formerly known as Maltran Air Services Corp Sdn Bhd) and another appeal [1996] 2 MLJ 517 (refd)

Doshi v Yeoh Tiong Lay [1975] 1 MLJ 85 (refd)

Appeal from: Civil Suit No 22–217 of 2000 (High Court, Ipoh)

Ngeh Koo Ham (Ngeh & Co) for the appellants.

Ng Poh Tat (Ng Poh Tat & Co) for the first respondent.

Kamarul Ariffin bin Hassan (Kamarul Hakimi Ansor & Partners) for the first and second defendants.

Raus Sharif JCA (delivering judgment of the court):

[1] This appeal is directed against the decision of the High Court, Ipoh. The learned judge had held that there was an enforceable contract entered between the first defendant and the plaintiff. The contract was to sell and purchase a shop house held under document of title HS(D) DGS 1149, PT 4039, Mukim Sitiawan, Perak ('shop house'). The appeal is by the third, forth and fifth defendants. They too had claimed that they had an enforceable contract with the first defendant over the same shop house.

[2] The facts relevant to this appeal are as follows.

[3] The first defendant, IZA Construction Co Sdn Bhd, is the beneficial owner of the shop house. The registered owner is the second defendant, the Perbadanan Kemajuan Negeri Perak. The plaintiff wanted to purchase the shop house. On 13 July 1999, she paid to a firm of solicitors M/S Adham Badrul Co ('AB solicitors') RM13,000, representing 10% of the purchase price, as deposit for the purchase of the shop house. AB solicitors were acting for the first defendant.

[4] On 24 August 1999 a draft sale and purchase agreement ('agreement') was prepared by the plaintiff's solicitors, M/S Mustafa, Ling & Co. The agreement was forwarded to AB solicitors. On 23 September 1999, AB solicitors replied that the sale price shall be RM180,000. They requested the plaintiff's solicitors to amend the agreement. The amendments as suggested by AB solicitors was done by the plaintiff's solicitors. On 14 October 1999, three copies of the agreement were forwarded to AB solicitors.

[5] On 21 October 1999, at about 15.14pm, the plaintiff's solicitors received from AB solicitors, a copy of a letter dated 20 October 1999, by fax informing that:

(a) the first defendant had obtained a consent letter from the second defendant to transfer to the first defendant the shop house, and

(b) the first defendant would only sign the agreement provided that the plaintiff agreed to pay the first defendant RM18,000 being the deposit and RM500 to second defendant being the service fees of the transfer.

[6] The plaintiff's solicitors responded immediately. On the same day, ie 21 October 1999, they forwarded to AB solicitors a cheque for RM18,000 as deposit and another cheque for RM500 as service fees in favour of the second defendant. However by a letter dated 22 October 1999, the plaintiff's solicitors was informed by AB solicitors that they did not have any authority to accept the cheques. They also received on the same day a letter dated 20 October 1999, from AB solicitors stating that the first defendant had no longer any intention to proceed with the transaction.

[7] The plaintiff, unhappy with the action of the first defendant lodged a caveat on the title of the shop house. It was lodged on 20 October 1999.

[8] It is the plaintiff's case that she had an enforceable contract with the first defendant. Hence, in her statement of claim, she sought for the following reliefs:

(i) a declaration that a contract exist between herself and the first defendant over the shop house;

(ii) specific performance of the contract;

(iii) vacant possession of the shop house;

(iv) damages;

(v) a set off from the damages to be awarded against the balance payment of purchase price and other outgoings levied on the shop house; and

(vi) costs.

[9] The first defendant did not deny of the negotiations between themselves and the plaintiff over the sale and purchase of the shop house. However in their defence, they contended that the offer to purchase was withdrawn on 20 October 1999 because the plaintiff had failed to pay the RM18,000 deposit. As a result they had

entered into another sale and purchase agreement ('alternate agreement') with the third, forth and fifth defendants for the sale and purchase of the shop house.

[10] The alternate agreement was purportedly signed on 25 October 1999. The purchase price was RM190,000. The 10% deposit was paid on 22 October 1999. RM38,000 was paid subsequently. The balance was settled by way of a bank loan from Hong Leong Bank Berhad. But the transfer and the charge could not be registered due to the caveat entered by the plaintiff.

[11] The third, forth and fifth defendants' case is that they had an enforceable contract with the first defendant. Thus, in their counter-claim against the plaintiff and the first defendant, they demanded the removal of the caveat; the transfer of the shop house to them, and be compensated for the delay in completing the sale as the result of the caveat on the title of the shop house.

[12] During the trial before the High Court, it was agreed among all parties that the issue of liability should be determined firstly before the question of quantum is heard. With that understanding, the learned judge had after hearing evidence and submissions by all parties formulated two issues for his determination, namely:

(i) was there an enforceable contract entered into between the first defendant and the plaintiff to sell and purchase the shop house under the circumstances;

(ii) if there is an existence of an enforceable contract what are the rights and interest of the third, forth and fifth defendants in the shop house.

FIRST ISSUE

[13] The learned judge answered the first issue in the positive, that is, that there was an enforceable contract entered into between the first defendant and the plaintiff. The learned Judge held that the second offer to purchase the shop house commenced when the AB solicitors on 23 September 1999 wrote to the plaintiff's solicitors declaring the purchase price has had been varied to RM180,000. The offer was accepted by the plaintiff when the plaintiff's solicitors by a letter dated 21 October 1999, tendered the two cheques amounting to RM180,000 and RM500 respectively to the AB solicitors.

[14] Before us learned counsel for the third, forth and fifth defendants submitted that the learned judge had erred in facts in concluding that there was a concluded contract between the plaintiff and the first defendant. According to him, the said decision was against the weight of evidence adduced in court. To him, the offer to sell the shop house had been withdrawn when the deposit allegedly was not paid by the plaintiff.

[15] With utmost respect and having read and re-read the judgment under appeal, we do not detect any error on the findings of the learned judge. Clearly, the learned judge did consider all the evidence in its entirety but found the evidence of the first defendant to be lacking in credibility. This is what he said:

Was this offer accepted? I find that it was. Not by the letter from the plaintiff's solicitors dated 14 October 1999 (p 9 of encl 16) but by the plaintiff's solicitor's subsequent letter dated 21 October 1999 (p 16 of encl 16) where the plaintiff's solicitors tendered the two cheques amounting to RM18,000 and RM500 respectively to AB solicitors.

Though the first defendant insists that their solicitor did not receive this letter with the attached cheques until the 23 October 1999, which time AB solicitors had terminated the offer in their letter to the plaintiff's solicitor (p 14 of encl 16), I find this not probable.

To begin with, this letter purporting to terminate the offer for sale by AB solicitors is dated 20 October 1999. But, as insisted by the DW 2 (the solicitor in AB solicitors in charge of this transaction) this date is incorrectly inserted. It should be 22 October 1999. If it is dated the 22nd then it may have clashed with the receipt of the plaintiff's letter of acceptance. However this is challenged by the first defendant who maintains that its solicitors never received this letter of acceptance on the 22nd, but on the 23rd. But this claim is tainted with inaccuracy. If AB solicitors only received the plaintiff's solicitor's letter of offer on the 23rd AB solicitors would have dated their letter returning the cheques subsequent to the 23rd. Instead their letter bears 22 October 1999. This obviously implies that AB solicitors must have first received the plaintiff's solicitor's letter of offer with the cheques before returning them by letter of the even date; and not on the 23rd as claimed.

When this discrepancy was raised, DW 2, attempted once again, to explain that the said letter was incorrectly dated. But mistake, as an excuse seems to be too rampant and flippant in this case to be convincing. I am of the view that documentary evidence bears greater truth than the oral testimonies of the first defendant's witnesses. This letter of the AB solicitors dated the 22nd specifically referred to the plaintiff's solicitor's letter of offer of the 22nd. It must have been written immediately upon receipt. There was urgency at the material time. The third to fifth defendants had paid the 10% deposit for the fresh sale on the same day. These circumstances warranted an immediate reply, and I believed that they did on the 22nd itself rather than the 23rd.

[16] It is our judgment that the above findings of the learned judge were findings of facts. There is no dearth of authority dealing with the approach what the appellate court should take when reviewing the findings of facts by the trial court. The settled principle of law is that, it is undesirable that the factual findings of the trial court be disturbed by the appellate court unless it appears that those findings are clearly wrong. And it is even more undesirable to do so where the conclusion reached, to a large extent, depended on the credibility of the witnesses and the impression formed by the trial judge which has seen them and judged their honesty and accuracy. (See Federal Court case of *China Airlines Ltd v Maltran Air Corp Sdn Bhd (formerly known as Maltran Air Services Corp Sdn Bhd) and another appeal* [1996] 2 MLJ 517).

[17] In the present case, the conclusion reached by the learned judge was based on the credibility of the witnesses and the impression that he formed. He found it as a fact that the plaintiff's acceptance of the offer was received by AB solicitors on 22 and not on 23 as claimed by the first defendant. The learned judge disbelieved the first defendant's story as he found the evidence of the first defendant to be lacking in credibility. He gave his reasons for holding as such. Looking at his reasons, we do not see it in any way tainted with lack of judicial appreciation of the evidence placed before him. Nor did he commit any fundamental misdirection or plainly wrong in

his conclusion or inference to justify this court's intervention. Thus, we are unable to accept the invitation of the learned counsel for the third, forth and fifth defendants to reverse the findings of fact of the learned judge. We agree with the learned judge that there was an enforceable contract between the plaintiff and the first defendant over the shop house.

SECOND ISSUE

[18] The learned Judge found that since the plaintiff had a prior right to the said shop house, the third, forth and fifth defendants' claim that they had an enforceable contract with the first defendant cannot succeed. He also made a finding that the equitable principle of a bona fide purchaser for value, as claimed by the third, forth and fifth defendants, has no application in this case. Firstly, it was not pleaded. Secondly, the facts does not support such claim. The learned judge's reasons are as follows:

> 1. The speed of this sale between the first defendant and the third to fifth defendants creates suspicion that these subsequent purchasers are not without knowledge of a prior buyer for the said property. They came to know of the property was for sale on the 21 October 1999 and by the afternoon on the next day, 10% deposit was paid, without even making a search with the Land Office to ascertain whether the said property was encumbered. If they had done so, even after the 22 October 1999 but before the entering into the sale and purchase agreement with the first defendant, they may find the plaintiff's caveat being lodged against the said property.
>
> 2. Further, AB solicitors were their solicitors. These solicitors have knowledge of the existence of an existing sale of the said property by the first defendant to the plaintiff. When their lawyers are possessed of this knowledge it is not open to the third to fifth defendants to claim that such matter was not disclosed to them — see the case of *Dorshi v Yeoh Tiong Lay* [1995] 1 MLJ 85.

[19] We have no reasons to differ from the learned judge. It is our judgment that the third, forth and fifth defendants were not innocent bona fide purchasers as they claimed. The facts as found by the judge clearly demonstrate that they knew about the transaction between the plaintiff and the first defendant. Even in law, they cannot claim that they have no knowledge of the said transaction. This is because AB were their solicitors. Their solicitors knew of the existence of the transaction between the plaintiff and the first defendant. It is an established principle that the knowledge of a solicitors is the knowledge of the client (see Federal Court case of *Doshi v Yeoh Tiong Lay* [1975] 1 MLJ 85). Thus, the third, forth and fifth defendants being aware of the existence of an existing transaction between the plaintiff and the first defendant cannot, as they did, claimed that they were the innocent bona fide purchaser of the shop house.

[20] For the above reasons, we unanimously would dismiss the third, forth and fifth defendants' appeal with costs. All the orders of the learned judge are hereby affirmed. We would also order that the deposit is to be paid to the plaintiff to account of taxed costs.

Appeal dismissed with costs.

Reported by Brendan Navin Siva